IN THE

Supreme Court of the United States

October Term, 1969

No. 1049

GEORGE GABLE, doing business as
BOOK SALES CO.,

Appellant,

vs.

HERBERT T. JENKINS, Chief of Police
of the City of Atlanta,

Appellee.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

REPORT OF OPINION OF COURT BELOW

The opinion of the court below has not been yet officially reported, but a copy is appended hereto.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

The action in the court below was brought before a three-judge U.S. District Court pursuant to Title 28, Sections 2281 and 2284, U.S.C.A. to enjoin the enforce-

ment of a statute of the State of Georgia on the ground that such statute was violative of the First Amendment to the United States Constitution, enforceable against the States by operation of the Due Process Clause of the Fourteenth.

The judgment sought to be reviewed was dated and entered October 24, 1969, and the notice of appeal was filed in the office of the Clerk of the United States District Court for the Northern District of Georgia on the 10th day of November, 1969.

Jurisdiction of this appeal has been conferred upon this Court under and by virtue of 28 U.S.C.A. #1253.

The cases believed to sustain the jurisdiction of this Court are *Zwickler v. Koota,* 389 U.S. 241, and *Dombrowski v. Pfister,* 380 U.S. 479.

The statute of the State of Georgia, the validity of which is involved in this appeal, will be found in Georgia Code 26-2101 and a verbatim copy is set forth in an appendix to this statement.

QUESTIONS PRESENTED BY THIS APPEAL

1. Whether Georgia Code Section 26-2101 is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it is too vague and fails to set forth proper standards for adjudication, and is overbroad on its face, violating the First and Fourteenth Amendments to the Constitution of the United States by prohibiting the dissemination of obscene materials to "any person."

2. Whether Georgia Code Section 26-2101 is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it

fails to provide for a prior judicial determination with an adversary hearing prior to an arrest or a prosecution.

CONCISE STATEMENT OF THE CASE

Appellant is engaged in the business of distributing for profit printed material consisting of books and periodicals to the general public, and the appellee is the Chief of Police of the City of Atlanta. A subordinate member of the Police Department visited appellant's place of business, seized a group of books and commenced a prosecution in the Municipal Court of Atlanta under the authority of the Georgia statute herein alleged to be unconstitutional.

Appellant applied for an Injunction and Declaratory Judgment, both temporary and permanent, against the Chief of Police, and a three-judge district court was convened. It was admitted and stipulated that the appellee would continue in the future to prosecute and arrest the appellant and seize his books if the statute was held constitutional.

The three-judge district court, after a hearing, held they had jurisdiction in the case, and entered a Declaratory Judgment that the statute was constitutional. A direct appeal was taken to this Court.

GROUNDS OF SUBSTANTIALITY OF FEDERAL QUESTIONS

The questions herein are substantial and require plenary consideration because the Georgia statute is too broad in that it makes penal the distribution of books and magazines "to any person", thereby prohibiting its dissemination to persons willing and desirous of reading or seeing such articles.

The questions are also substantial and require plenary consideration because the language of the statute is so vague that it fails to set forth proper standards for adjudication, and permits an arrest, seizure, prosecution and criminal penalties for violation of its terms without any prior adversary hearing or judicial determination that the matter contended to be obscene is in fact obscene.

The enforcement of this statute by the appellee will result in the abolition of the rule by this court as stated in *Stanley v. State of Georgia,* U.S. by prohibiting persons who are adults, and who may have a desire to possess, view or read the contents of such prohibited materials, from doing so.

The enforcement of this statute will deprive persons, who may be willing buyers, from ever legally obtaining such material or viewing films that may be contended by a mere police officer to be obscene.

The enforcement of this statute will expose every person engaged in the business of selling or distributing books, magazines or periodicals to the danger of continual harassment and prosecution even though his idea of what is obscene may differ from some magistrate in the future or a police officer in the present, and especially to the language in subsection (b) of the statute which defines material to be obscene if "it goes substantially beyond customary limits of candor." The appellant fears that his idea of what is the "customary limit of candor" may be different from that of the police officer, the prosecuting attorney, a juror or a judge, and that because his definition may differ in his view, he may suffer possible imprisonment.

APPENDIX

Attached hereto is a complete copy of the opinion and judgment of the district court from which the appeal was taken in this case.

Attached hereto is also a complete copy of the Georgia Code section alleged to be unconstitutional.

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(Filed in Clerk's Office Oct. 24, 1969, Claude L. Goza, Clerk; By: MJD, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE GABLE, doing business as BOOK SALES CO.,
Plaintiff
vs.
HERBERT T. JENKINS, Chief of Police of the City of Atlanta,
Defendant

CIVIL ACTION
NO. 13001

Before MORGAN, Circuit Judge, HOOPER and SMITH, District Judges.

MORGAN, Circuit Judge:

Plaintiff George Gable is engaged in the business of distributing printed material consisting of books, magazines and periodicals, and defendant Chief of Police Herbert T. Jenkins, whose duty it is to enforce the penal laws of the State, has caused plaintiff to be arrested and a number of his books seized for violating Code 26-2101 prohibiting the distribution of obscene material. Jurisdiction is properly invoked.

Plaintiff alleges that the Georgia statute, 26-2101, under which he is being prosecuted, violates the First and Fourteenth Amendments of the United States Constitution. We do not believe that the right involved herein is a public right; however, assuming *arguendo* that it is, the discussion below should suffice. *Carter* v. *Gautier*,

The contentions are seriatim discussed in particular.

1.

Plaintiff's first point of contention is that Code 26-2101[1] is violative of the Constitution in that it is vague

[1]The Georgia general obscenity law, Ga. L. 1968, p. 1249, 26 Ga. Code 2101, provides as follows:

CHAPTER 26-21. DISTRIBUTING OBSCENE MATERIALS.

26-2101. Distributing Obscene Materials.

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do.

(b) Material is obscene if considered as a whole, applying community standards, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

and facially overbroad. Vagueness of a criminal law rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. If the scope of the power given to officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the subjective views of those officials as to the propriety of the conduct, the statute is unconstitutional as a denial of due process. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); *Gilstrap* v. *United States,* 389 F. 2d 6 (5 Cir., 1968). The concept of overbreadth of criminal laws rests on principles of substantive due process which forbid the prohibition of certain individual freedoms, the principal issue not being reasonable notice or adequate standards, though such issues may be involved, but whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. *Winters* v. *New York,* 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665; *Landry* v. *Daley,* 280 F. Supp. 938 (D.C. Ill., 1968).

Applying these rules of law to the present statute leads this Court to the conclusion that the plaintiff's contention is void of merit. Georgia Code Section 26-2101 is a recent enactment of the Georgia Legislature[2] and does but two things — it prohibits the distribution of obscene materials and defines what is meant by the term "obscene materials". In defining this term, the statute carefully utilizes the definition of obscene materials as that term has been elucidated by the United States Supreme Court in *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304; and *Memoirs* v. *Massachusetts,* 383 U.S. 413, 86

[2]July 1, 1969 — effective date.

S.Ct. 975. The prior statute on this subject (Ga. Code 26-6301) was not nearly so well written nor did it contain the definition of obscenity as defined by the Supreme Court, yet a three-judge court in this district recently upheld its constitutionality in *Great Speckled Bird of Atlanta Cooperative News Project* v. *Stynchcombe,* 298 F. Supp. 1291 (April 16, 1969). This new code section, 26-2101, is simply a more limited version of the former Georgia law, 26-6301, and has a stronger constitutional base than the former Georgia statute.

However, as to the overbreadth of the statute there is one phrase that plaintiff isolates as being defective. Section 26-2101 prohibits in subsection (a) the dissemination "to any person" of obscene material. The plaintiff argues the term "any person" is too broad. In support of this allegation, the United States Supreme Court case of *Stanley* v. *Georgia,* 22 L.Ed. 2d 542, is relied heavily upon. *Stanley,* supra, gives a comprehensive study of Freedom of Expression guaranteed by the Bill of Rights to the Constitution and the intrusion of obscenity into this almost unlimited freedom. Obscenity, it was stated in *Roth,* supra, is not within the protected pale of the First and Fourteenth Amendments. However, *Stanley* tempers this broad mandate by the allowance of the private possession of obscene materials. As Justice Marshall stated in his concluding paragraph in *Stanley*: "As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home". These words indicate a conscious desire on the part of that Court to keep *Stanley* limited to its fact and no statements in the body of the opinion could logically be construed to encompass the contention of plaintiff. Plain-

tiff divines several situations under which the working of 26-2101 might be overly broad, viz., a husband showing an obscene book to his wife, or consenting adults being prohibited from gathering in a private home to view an obscene film. However, as was stated in *Stanley*, "No such dangers are presented in this case".

Without an illogical extension of *Stanley*, the Supreme Court decisions allowing the regulations of obscenity would appear to demand a holding that Georgia Code 26-2101 is constitutional.

2.

Secondly, plaintiff alleges that 26-2101 is unconstitutional in that it does not provide for a prior judicial determination with an adversary proceeding before arrest. Plaintiff's contention that a prior adversary proceeding is constitutionally necessary before the seizure of obscene material is correct. As stated in *Carter* v. *Gautier*, ___ F. Supp. ___ [No. 2422, Sept. 1969, M.D. Ga.]: "Under the law as now established by the Supreme Court . . . it is illegal for officers to seize a movie film unless and until there has been held a prior adversary judicial hearing upon the question of obscenity. *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 12 L.Ed. 2d 809 (1964)." See *Tyrone, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4 Cir., 1969). Moreover, we specially concur in the thoughts expressed in *Carter*, to-wit:

> "This, of course, does not mean that courts, either Federal or State, desire to protect obscenity. It does mean that the Supreme Court has decided that lest the non-obscene and the constitutionally protected be suppressed it is better that some judicial officer . . . determine that the challenged matter is obscene

> before its seizure. Nor is it any reflection upon law enforcement officers who deserve our thanks and support in greater measure than sometimes received to suggest that a judicial officer trained in the process of weighing evidence and making decisions is better equipped than they to pass upon the important and sometimes difficult question of obscenity."

However, as to the necessity of the prior adversary hearing, this goes merely to the competency of the evidence in an obscenity prosecution and would not bar a prosecution based on other legally obtained evidence. Matter seized illegally, i.e., without a hearing, must be returned. In *Marcus* v. *Property Search Warrant,* 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708 (1961), the evil was that the hearing as to the obscene nature of the material was held after seizure, thereby the Supreme Court concluded that the procedure employed was unconstitutional. There is proper procedure existing in the Georgia law that can achieve constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items.[3] Accordingly, Georgia Code 26-2101 is not unconstitutional in that it does not establish a prior judicial hearing within itself.

In the case, *sub judice,* the material was seized with-

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[3]As examples, the following are presented: When a search warrant is applied for to seize the alleged obscene materials, the person possessing the same could be given notice of the intent to apply for the search warrant, and be given an opportunity to be present at such time, and present evidence in opposition to the issuance of the search warrant. Or an order to show cause why the alleged obscene film is not obscene could be served on the possessor, or a petition to have the film declared contraband, and subject to destruction could be served on the possessor.

out a prior adversary hearing; and, therefore, the procedure is in conflict with the proper constitutional standard. However, the defendants have agreed to return questioned material and are under order of this Court to do so.

ORDER

In accordance with the views expressed above, Georgia Code Annotated 26-2101 is held to be constitutional and within the purview of the First and Fourteenth Amendments to the United States Constitution. Plaintiff's requested injunctive relief is denied. Plaintiff's seized material is to be returned.

IT IS SO ORDERED.

This the 24 day of October, 1969.

/s/ LEWIS R. MORGAN

LEWIS R. MORGAN
United States Circuit Judge

/s/ FRANK A. HOOPER

FRANK A. HOOPER
United States Senior
District Judge

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

EXHIBIT B

CHAPTER 26-21. DISTRIBUTING OBSCENE MATERIALS

26-2101. Distributing Obscene Materials.

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do.

(b) Material is obscene if considered as a whole, applying community standards, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

MAR 26 1970
JOHN F. DAVIS, CLERK

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OCTOBER TERM, 1969

No. 1049

GEORGE GABLE, doing business as BOOK SALES CO.,
Appellant,

versus

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Appellee.

MOTION TO DISMISS
THE APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FROM THE FINAL ORDER OF THE COURT IN CIVIL ACTION NO. 13001.

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IN THE
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Appellee.

MOTION TO DISMISS
THE APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FROM THE FINAL ORDER OF THE COURT IN CIVIL ACTION NO. 13001.

Appellee moves to dismiss the appeal filed by Appellants from the final Order of the United States District Court for the Northern District of Georgia on the grounds that this Court lacks jurisdiction pursuant to 28 U.S.C. §1253 as asserted by Appellant. Jurisdictional Statement of Appellant, p.2.

STATEMENT

In the case at bar, Appellant applied for both temporary and permanent injunctive relief (section "(d)" of prayer for relief in Appellant's original "Complaint") as well as for declaratory judgment as to the constitutionality of Ga. Code Annotated 26-2101. Appellant took no practical steps in securing the "temporary" or preliminary relief for which he prayed and allowed the case to proceed to hearing by the three-judge district court on the merits. The three-judge district court held they had jurisdiction in the case and entered an order holding Georgia Code Annotated 26-2101 to be constitutional and denied Appellant's "requested injunctive relief." No ruling was ever entered on and no consideration was given to Appellant's request for a *preliminary* injunction. Appellant contends that "jurisdiction of this appeal has been conferred upon this Court under and by virtue of 28 U.S.C.A. #1253". Jurisdictional Statement, p.2.

THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL PURSUANT TO 28 U.S.C. §1253

Appellee asserts that this Court does not have jurisdiction to hear this appeal pursuant to 28 U.S.C. §1253. Appellant urges that the recent decision of this Court in *Anghel Goldstein a/k/a Andrei Pietraru et al. v. Joseph A. Cox et al,* 38 LW 4125 (January 26, 1970) (hereinafter "Cox") is dispositive of the jurisdictional issue involved herein.

In *Cox* this Court asserted, with specific reference to 28 U.S.C. §1253, that:

> ... the only interlocutory orders which we have power to review under that provision [§1253] are orders granting or denying *preliminary* injunctions. Since in our view the District Court here decided no question of preliminary injunctive relief, we cannot review its order. (Emphasis supplied by the Court)

This Court proceeded to analyze Section 1253 and to discuss its history and legislative intent. While this Court noted that the Section read literally might compel the conclusion that interlocutory orders denying preliminary as well as permanent injunctions can be appealed to the Court, it was quick to point out that such a construction would involve an expansion of the Court's mandatory appellate jurisdiction over that granted by the clear language of the prior statute. This Court stated that no such expansion was intended by Congress in light of the traditionally, narrowly construed jurisdiction under the Three-Judge Court Act and the undesirable practice of piecemeal appellate review. Citing *Switzerland Assn. v. Horne's Market*, 385 U.S. 23 (1966); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949); *Phillips v. United States*, 312 U.S. 246 (1941); *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317 (1926); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251 (1916). This Court then asserted:

> In light of these factors, and the history of the statute as set out above, we cannot but con-

clude that our jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a *preliminary* injunction. (Emphasis supplied)

CONCLUSION

Appellee, therefore, respectfully requests this Court to dismiss the appeal from the Order of the District Court for the Northern District of Georgia.

HENRY L. BOWDEN

JOHN E. DOUGHERTY
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon Counsel for Appellants, Wesley R. Asinof, Esq., a copy of the Motion to Dismiss in the above-styled case by placing the same in an envelope with sufficient postage and proper address and mailing same to Counsel for Appellants by Registered United States Mail.

HENRY L. BOWDEN